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No. 83-21

In The

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

MCI COMMUNICATIONS CORPORATION and MCI TELECOMMUNICATIONS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Dated: August 23, 1983

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION[1]

MCI's Opposition attempts to portray AT&T's Petition as a challenge to the Seventh Circuit's factual findings, not to its legal standard. This characterization is astonishing. It is flatly contradicted by the Seventh Circuit's holding, by the arguments MCI makes in its separate Petition for Certiorari, and by MCI's own position before the Seventh Circuit.

[1] The Statement Required By Rule 28.1 appears at p. ii of the Petition for Writ of Certiorari.

The Seventh Circuit here *acknowledged* the strong possibility that the jury's findings on the interconnection charges that were affirmed were tainted by the jury's findings on the Hi-Lo predatory pricing charges that were reversed, and it appears to have expressly found that some "spillover" and prejudice existed. App. 241a. It is therefore manifest that no factual issue exists and that the Seventh Circuit's decision rests solely on its legal standard. If the Seventh Circuit had applied the "clear absence of taint" legal standard of the Second, Third, Fifth, Sixth, and District of Columbia Circuits, the jury's findings on the interconnection charges would have been vacated and the case remanded for a new trial on liability as well as damages. *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931); Petition 8-14. It was only because the Seventh Circuit applied a different legal standard, under which the likelihood of taint was not decisive and under which the court undertook to "balance" the prejudice to AT&T against MCI's interest in having the interconnection findings upheld, that the Seventh Circuit was able to affirm the jury's liability findings. App. 241a.

MCI's own arguments in the Court of Appeals and in this Court are further proof of the point. Before the Seventh Circuit, MCI also acknowledged the strong possibility of taint and "spillover" prejudice,[2] and it therefore vigorously argued that the Seventh Circuit should reject a legal standard that made the possibility of taint determinative. Answer of MCI to AT&T's Petition

[2] That possibility was inherent in MCI's single-count monopolization claim and its argument to the jury that both AT&T's Hi-Lo tariff (which was AT&T's competitive response to MCI) and its interconnection denials for FX and CCSA proceeded from a single anticompetitive intent. Accordingly, the trial court instructed the jury to consider "each distinct aspect of AT&T's conduct . . . in the context of all AT&T's conduct" (App. 231a). MCI now relies upon this same unitary intent theory in its separate Petition for Certiorari (No. 83-32) (pp. 3-5) (although this theory provides no support for any challenge to the Seventh Circuit's holdings that the District Court's pricing and damages findings were each infected with several reversible errors).

for Rehearing, 7 n.*, 8, & 8 n.*; see also Brief of Appellees 10-20. MCI then claimed that *Champlin Refining Co.* and other decisions adopting a "clear absence of taint standard" were distinguishable or erroneous. Answer of MCI to AT&T's Petition for Rehearing, 7 n.*, 8 n.* Because the Seventh Circuit agreed with MCI and declined to follow these decisions, MCI's own prior arguments confirm that the Seventh Circuit's decision conflicts with the legal standards applied by other courts and demonstrate the importance and appropriateness of review by this Court.[3]

[3] Even if the Seventh Circuit correctly resolved the taint question, it separately erred in permitting a retrial limited to damages alone because the liability findings of the first jury on the remaining interconnection charges are not "so distinct and separable" that a second jury could determine what those findings mean in considering the damages issue. *Gasoline Products Co., Inc. v. Champlin Refining Co., supra*, 283 U.S. at 500; Petition 14-18.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, this Court should grant the petition for writ of certiorari and reverse the judgment below insofar as it limits the retrial of the remaining interconnection issues to damages alone.

Respectfully submitted,

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